

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

<hr/>	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
<hr/> STEVEN BELL <hr/>	:	NO.01-691
	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 31st day of January, 2002, upon consideration of Defendant's Motion to Suppress Physical Evidence and Post-Arrest Statements (Document No. 13, filed January 11, 2002), Defendant's Amended Motion to Suppress Physical Evidence (Document No. 24, filed January 28, 2002), ¹Government's Trial Memorandum and Response to Defendant Steven Bell's Motion to Suppress Evidence (Document No. 17, filed January 14, 2002), and an evidentiary hearing held on January 31, 2002, **IT IS ORDERED** that, for the reasons set forth in the following Memorandum, Defendant's Motion to Suppress Physical Evidence and Post-Arrest Statements and Defendant's Amended Motion to Suppress Physical Evidence are **DENIED**.

MEMORANDUM

I. BACKGROUND

The case arises out of the possession of a semi-automatic pistol by defendant, Steven Bell, on September 5, 2000, following his November 16, 1987 conviction in Philadelphia County

¹Defendant's original Motion only seeks to suppress physical evidence. No mention was made in that Motion of post-arrest statements. The Amended Motion deletes reference to "Post-Arrest Statements" in the caption; in all other respects it is identical to the original Motion.

Court of Common Pleas for felony robbery, aggravated assault, and related charges for which he received a sentence of six to 20 years imprisonment. On November 14, 2001, the federal grand jury indicted defendant on one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Defendant now seeks to have the firearms suppressed, arguing that FBI Special Agent Kevin McShane violated defendant's Fourth Amendment rights by conducting a warrantless search of defendant's car. The Court conducted an evidentiary hearing on January 31, 2002, and now denies defendant's motions.

The Court first sets forth the relevant facts for purposes of this motion. At the hearing, Agent McShane testified as follows:

On September 5, 2000, defendant was wanted on a warrant for failing to appear in the Philadelphia County of Common Pleas on illegal weapons charges and on a state parole violation charge. See Exhibit A of Gov's Trial Memo. and Response to Def. Steven Bell's Motion to Suppress Evidence Obtained on September 5, 2000. Agents and officers of the FBI's Fugitive Task Force received information on September 5, 2000 that defendant Steven Bell would be in the 1900 block of North 32nd Street in Philadelphia. The agents set up surveillance. At approximately 10:45 a.m., agents observed Bell enter a 1987 burgundy Oldsmobile. The agents determined that the car was registered to "James Moore" of 1905 N. Napa Street, Philadelphia, Pennsylvania. Defendant Bell had used the name "James Moore" when he was arrested in June 2000, and 1905 N. Napa Street, Philadelphia, Pennsylvania is Bell's address. On September 5, 2000, Agent McShane was aware that defendant used the alias "James Moore."

The agents followed defendant as he drove to a corner store located at 2015 North 31st Street. Defendant parked his car in front of the store, exited the car, and entered the store,

leaving the engineer running.

Agent McShane and Philadelphia Police Officer Brian Vivino entered the store and arrested defendant. They searched defendant and found a clear plastic baggie containing eight (8) red smaller baggies of cocaine base (“crack”). Defendant was placed in the back of a marked Philadelphia Police car. Agent McShane then entered the driver’s side of defendant’s vehicle to turn off the running engine, and noticed the butt of a handgun sticking out from underneath the driver’s seat. He observed that the handgun was in a holster. He immediately removed the keys from the ignition, secured the car without moving the gun, and called FBI Special Agent Donald Bain III. Agent Bain arrived on the scene approximately 10 to 15 minutes later, photographed the handgun, and then secured the firearm. After Agent Bain took custody of the gun, defendant’s car was searched.

The firearm seized by Agent Bain is an operable Taurus 9-mm semi-automatic handgun model P1992 with a serial number of TIK00155. The firearm was fully loaded with 15 live rounds and one in the chamber at the time of seizure.

The agents next tasked defendant about the “status of his car.” In response, defendant told the agents that his friend was present and could take possession of the keys and the car. The keys to the vehicle were then given to defendant’s friend, Robert Watson, by the agents.

At the hearing, defendant presented two witnesses, Aisha Vance and Syretta Baylor. Aisha Vance testified that she saw defendant, who she knew from the neighborhood, enter the Big H Food Store, at the corner of 31st and Page Streets. She then witnessed plain clothes officers bring defendant out of the store and put him into the back of a marked police car. According to Vance, the officers began to search defendant’s car immediately after they put

defendant into the marked police car. Vance observed these events from the corner of 31st and Norris Streets, which she estimated to be approximately 75 feet from where defendant parked his car on September 5, 2000.

Syretta Baylor, defendant's girlfriend, testified that she went to the Big H Food Market on September 5, 2000 and saw defendant sitting in the back of a marked police car; she did not know how long defendant had been sitting in the police car. At that time Baylor observed three plainclothes officers searching defendant's car. Approximately two to three minutes later she saw police officers place a gun into a plastic bag.

II. DISCUSSION

A. DEFENDANT WAS ARRESTED PURSUANT TO A VALID WARRANT

Defendant asserts that the firearm should be suppressed as the fruit of an illegal arrest in violation of his Fourth Amendment rights. The Court rejects this argument because defendant was lawfully arrested pursuant to a valid warrant. The Government has established that on September 5, 2000, defendant was wanted on a warrant for failing to appear in Philadelphia Court of Common Pleas on illegal weapons charges and on a state parole violation charge. See Exhibit A of Gov's Trial Memo. and Response to Def. Steven Bell's Motion to Suppress Evidence Obtained on September 5, 2000. The arrest was made pursuant to this warrant.

B. THE SEARCH OF DEFENDANT'S CAR WAS LAWFUL

Defendant contends that the firearm should be suppressed as the fruit of an illegal search of his car in violation of his Fourth Amendment rights. "The Fourth Amendment generally requires police to secure a warrant before conducting a search." Maryland v. Dyson, 527 U.S.

465,466(1999)(citing Californiav.Carney ,471U.S.386,390-91(1985)).Oneexceptionto thisrequirementispoliceexerciseoftheircommunitycaretakingfunction. See Cadyv. Dombrowski,413U.S.433(1973).“[T]hecommunitycaretakingfunctionis‘totallydivorced fromthedetection,investigation,oracquisitionofevidencerelatingtotheviolationofacriminal statute’...aslongassuchcaretakingactivitiesarewarranted,‘eitherintermsofstatelawor soundpoliceprocedure,’...theydonotoffendthefourthamendment.” UnitedStatesv. Rodriguez-Morales,929F.2d780,785(1stCir.1991)(quoting Cadyv.Dombrowski ,413U.S. 433,441,447(1973)).“Consequently,evidencewhichcomestolightduringthedueexecution ofthecaretakingfunctionisordinarilyadmissibleattrial.” Id.(citing UnitedStatesv.Lott ,870 F.2d778,781(1st Cir.1989)).

ThisCourthaspreviouslyruledthattakingcustodyofaparkedcartopreventtheftor vandalism“wasavalidexerciseofthe‘communitycaretakingfunction’ofthepolice.” United Statesv.1988BMW750IL,VehicleIDNo.WBAGC8318J2765453withAccessoriesand Equipment,716F.Supp.171,173(E.D.Pa.1988), aff’d,891F.2d284(3dCir.1989).That decisionwasbasedupon SouthDakotav.Opperman ,428U.S.364,369(1976),inwhichthe SupremeCourtheldthat“[t]heauthorityofpolicetoseizeandremovefromthestreetsvehicles impedingtrafficorthreateningsafetyandconvenienceisbeyondchallenge.”ThisCourt concludedin 1988BMW750IL thatpoliceexerciseofthecommunitycaretakingfunctionwas warrantedbecause,asneitheroccupantofthestoppedcarheldavaliddriver’slicense,therewas nooneavailabletolegallydrivethecarfromthesceneandthat“ a\$75,000car[leftparkedonthe sideofaroad]couldbethetargetoftheftorvandalism.” Id.

In Smithv.Thornburg ,136F.3d1070,1075(6thCir.1998),theSixthCircuitrecognized

that, as part of the community caretaking function, “officers were entitled to enter [a vehicle running in an area where a crowd had gathered] without a warrant in order to protect themselves and the public from the danger created by the manner in which plaintiff’s car was left unattended.” The Second Circuit, in United States ex rel LaBelle v. LaVallee, 517 F.2d 750, 755 (2d Cir. 1975), also upheld as legitimate an officer’s warrantless intrusion into an unattended car for the purpose of ensuring public safety. “The car, because of its bald tires, had come to a stop on a steep incline on a city road in the center of the traffic lane. [The officer’s] checking to see if the brake was on in the unoccupied car was a simple and necessary safety precaution which was clearly justifiable as part of the police ‘community caretaking function’ without regard to the lawfulness of LaBelle’s arrest.” Id. (citing Cady, 413 U.S. at 441-443).

Similar to the courts in Smith, LaBelle, and 1988 BMW 750 IL, the Court in this case concludes that, under the community caretaking function, Agent McShane was entitled to make a warrantless entry into defendant’s car for the purposes of protecting law enforcement officials and the public from the danger posed by defendant’s unattended running vehicle and preventing the theft of defendant’s car. ²

² The Court also notes that defendant’s act of leaving his car unattended with the engine running violated 75 Pa.C.S.A. § 3701, which is a “regulatory statute dealing with safe use of motor vehicles.” Santarlas v. Leaseway Motorcar Transport Co., 689 A.2d 311, 313 (Pa. Super. 1997). The Unattended Motor Vehicle statute provides:

Noperson driving or in charge of a motor vehicle shall permit the vehicle to stand unattended without placing the gear shift lever in a position which under the circumstances impedes the movement of the vehicle, stopping the engine, locking the ignition in vehicles so equipped, removing the key from the ignition and, when standing upon any grade, turning the front wheels to the curb or side of the highway and effectively setting the brake.
75 Pa.C.S.A. § 37019(a).

Once Agent McShane lawfully entered defendant's car, his seizure of the firearm from defendant's car was clearly lawful under the plain view exception to the warrant requirement. Under this well-recognized exception, a law enforcement officer may legally seize an item if the following three conditions are met: (1) "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed," Horton v. California, 496 U.S. 128, 136 (1990); (2) the officer has "a lawful right of access to the object itself;" id. at 137, and (3) "the incriminating character [of the seized evidence] was 'immediately apparent.'" Id. at 136; see also United States v. Menon, 24 F.3d 550, 560-61 (3d Cir. 1994).

There is no dispute that Agent McShane lawfully entered the car under the community caretaking function. Defendant, however, argues that the gun was not in plain view when Agent McShane entered defendant's car.

The Court finds that, although the testimony at the hearing diverged with respect to the time of the search of defendant's car after discovery of the gun, there was no direct evidence contradicting Agent McShane's testimony that when he opened the driver's side door of defendant's car, the gun was in plain view. The Court credits Agent McShane's testimony and thus finds that the gun was in plain view when Agent McShane lawfully entered defendant's car to remove the key from the ignition.

Agent McShane had a lawful right of access to the gun because it was in plain view on the floorboard of defendant's car when he lawfully entered the car under the community caretaking function. See Horton, 496 U.S. at 137 n.7; see also United States v. Sculo, 82 F. Supp.2d 410, 418-19 (E.D. Pa. 2000). Finally, the incriminating character of the firearm was immediately apparent to Agent McShane because Agent McShane was aware that defendant was

a convicted felon, and thus, could not lawfully possess a firearm. See 18 U.S.C. § 922(g)(1), (2).

Agent McShane's seizure of the gun from defendant's car clearly satisfied the three elements under Horton,³ and accordingly the Court denies the Motion to Suppress and the Amended Motion to Suppress.

III. CONCLUSION

For the foregoing reasons, defendant's Motion to Suppress Physical Evidence and Post-Arrest Statements and his Amended Motion to Suppress Physical Evidence are denied.

BY THE COURT:

JANE DUBOIS, J.

³In Horton, the Court explained that an officer need not discover the evidence inadvertently in order to justify a seizure. See id. at 128. Nevertheless, in this case, the Court finds that Agent McShane inadvertently discovered the gun because he entered defendant's car to turn off the engine and remove keys and saw the gun sticking out from underneath the driver's seat as he did so.